

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN PHILLIP TUCKER,

Defendant-Appellant.

UNPUBLISHED

March 4, 2003

No. 232094

Macomb Circuit Court

LC No. 00-000180-FC

Before: Whitbeck, C.J., and Griffin and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, following a jury trial, of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a).¹ The trial court sentenced defendant to concurrent terms of eighty-five to two hundred forty months' imprisonment on each count. We affirm.

Defendant first argues that the trial court erred in its responses to the jury's multiple requests to review transcripts of the victim's testimony. However, because defendant did not object to any of the trial court's responses to the notes from the jury, this issue is forfeited. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture, three requirements must be met: "(1) error must have occurred, (2) the error was plain, i.e. clear or obvious, and (3) the plain error affected substantial rights." *Carines, supra* at 763. Generally, the third requirement requires a showing of prejudice, that is, "that the error affected the outcome of the lower court proceedings." *Id.*

Ordinarily, the decision whether to allow a jury to examine transcript testimony is left to the sound discretion of the trial court. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). MCR 6.414(H) states in pertinent part:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the

¹ Defendant was charged with four counts of first-degree criminal sexual conduct.

possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

Here, it appears that the jury's requests to review the victim's testimony were reasonable. The trial court's commentary when refusing to provide the transcripts certainly implied that the jurors would not be able to review the testimony. Thus, even though the trial court stopped short of stating that review of the transcripts could *never* take place, the trial court's instructions may have been plainly erroneous.

However, even if plainly erroneous, defendant bears the burden of proving that his substantial rights were prejudiced by the unpreserved error. *Carines, supra* at 763. Here, there is no indication that the lack of a transcript of the victim's testimony affected the outcome of the proceedings.

One of the areas of apparent concern was whether there was any testimony supporting the charge related to digital-vaginal penetration. Ultimately, the jurors resolved this concern by acquitting defendant on the charge. Thus, defendant suffered no harm.

The other area of apparent concern was whether the victim's testimony supported the charge of pencil-anal penetration. The notes suggest that one or more jurors recalled the victim's testimony as suggesting pencil-vaginal penetration, which was inconsistent with the charge. The victim testified that defendant "shoved it [a pencil] up my private." Our review of the victim's testimony reveals that she used the word "private" broadly enough to include either "pencil-anal" or "pencil-vaginal" penetration. In light of the victim's testimonial ambiguity, we are not persuaded that a transcript of the victim's testimony would have resolved any possible confusion.² At the very least, defendant has not satisfied his burden of demonstrating that the error, if any, in not providing the jury a transcript of the victim's testimony affected the outcome of the proceedings. Consequently, defendant may not avoid forfeiture of this issue. *Carines, supra* at 763.

Defendant also contends that trial counsel's failure to preserve this issue deprived him of his constitutional right to effective assistance of counsel. A successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have

² We simply cannot determine what impact the transcript would have had on any particular juror's recollection of the victim's testimony; depending on how the ambiguity is construed, the testimony supports both a finding of guilty as charged and a finding of non-guilty as charged. In fact, we note that defendant does not challenge the sufficiency of the evidence supporting his conviction on the allegations of pencil-anal penetration. Ordinarily, a challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Here, if we were to view the victim's testimony in a light most favorable to the prosecution, we would undoubtedly conclude that there was sufficient evidence supporting defendant's conviction.

convicted the defendant.”³ *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Here, the jury’s notes to the trial court suggested that the jurors could not agree on the specifics of the victim’s testimony. Trial counsel’s strategy, therefore, may have been to rely on those jurors advocating against defendant’s guilt to prevail. In other words, trial counsel may have suspected that the transcript would only have helped the prosecution’s case. Further, aside from the aforementioned instance of ambiguity, the transcript also includes the victim’s description of other acts. Trial counsel may have decided that the victim’s testimony was too potentially prejudicial to justify the probative benefit. Accordingly, we do not believe that trial counsel’s performance was deficient. *Id.* Moreover, as noted above, we are not persuaded that the transcripts would have impacted the outcome of the proceedings. Consequently, we reject defendant’s contention that counsel was ineffective as to this issue. *Id.*

Next, defendant contends that the trial court erred in admitting the victim’s testimony that she had once seen defendant wearing feminine clothing and makeup. We review a trial court’s evidentiary rulings for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Outside the presence of the jury, the victim testified that defendant had threatened that he would strike her mother if she [the victim] told her [the victim’s mother] about the alleged sexual abuse. The victim noted that defendant had similarly threatened her on another occasion—when she saw him wearing makeup and “[g]irl clothes.” The trial court denied defendant’s request to exclude the testimony, ruling that this subject matter was “all part of this whole situation.” The trial court agreed to provide a cautionary instruction “[i]f you want it.” Defendant did not respond to the trial court’s statement, nor was the cautionary instruction issue raised again. Ultimately, the victim’s testimony before the jury was consistent with her testimony outside of its presence. No cautionary instruction was provided.

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. “Evidence which is not relevant is not admissible.” MRE 402.

We agree that the evidence relating to defendant’s cross-dressing was not directly relevant to the charges. However, defendant’s pattern of threatening the victim was certainly relevant to explaining the victim’s delay in reporting the abuse. Accordingly, the evidence was admissible pursuant to MRE 401.

However, MRE 403 states that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” Defendant does not cite MRE 403 on appeal, but generally contends that the evidence was “highly prejudicial” and “grossly prejudicial.” Although we agree that there was a danger of unfair prejudice, it does not

³ The trial court held a post-trial evidentiary hearing, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), to consider defendant’s claims of ineffective assistance of counsel. The trial court concluded that defendant had not suffered ineffective assistance. On appeal, a trial court’s factual findings are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

necessarily follow that the danger of unfair prejudice substantially outweighed the probative value of the evidence. Here, the victim's credibility was harmed by her delay in reporting the abuse. Moreover, the timing of the victim's reporting of the abuse—while there were contentious divorce issues unresolved—raised the possibility that she falsely alleged the abuse. The threats, however, offered some explanation for the delay. As such, we are not persuaded that the probative value of the testimony was substantially outweighed by the danger of unfair prejudice. Further, the trial court indicated that it was willing to provide an appropriate cautionary instruction. Accordingly, we conclude that the trial court did not abuse its discretion in allowing the testimony. *Bahoda, supra* at 289.

Defendant also challenges the trial court's failure to provide a cautionary instruction. We note that the trial court's final commentary on the matter indicated that it would be willing to provide a cautionary instruction, but only if defendant wanted it. Indeed, where "evidence is admissible for one purpose, but not others, the trial court must give a limiting instruction upon request." *People v Basinger*, 203 Mich App 603, 606; 513 NW2d 828 (1994). However, despite the trial court's statement, defendant did not ask for the cautionary instruction. Defendant cites no authority establishing that the trial court was required to provide an instruction sua sponte. Consequently, we find no error.

Defendant also contends that trial counsel's failure to request a cautionary instruction constituted ineffective assistance of counsel. As noted above, a successful claim of ineffective assistance of counsel requires a defendant to "show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider, supra* at 423-424. However, defendant must overcome a strong presumption that counsel's tactics were sound trial strategy. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Here, trial counsel may have decided that a cautionary instruction during the victim's testimony would have emphasized the cross-dressing, as well as the threats. Similarly, trial counsel may have also decided that an instruction at the end of trial would have necessarily reminded the jury that defendant had engaged in that peculiar behavior. It is conceivable that defense counsel preferred to let it go at that, rather than have the trial court offer the jury the unflattering reminder that defendant had dressed in women's clothing and had threatened the victim in connection with that activity. Because there is a possible strategic reason for declining to ask for the special instruction, we are not persuaded that counsel's performance was deficient. *Snider, supra* at 423-424.

Defendant references several other instances where trial counsel's conduct purportedly deprived him of his constitutional right to effective assistance of counsel.

For example, defendant contends that defense counsel was ineffective for failure to produce specific medical evidence to suggest that an automobile accident, not defendant's conduct, resulted in the victim's abnormal medical evaluation. During the *Ginther* hearing, trial counsel testified that he did not learn about the victim's pelvic injuries, suffered in the automobile accident, until after the trial concluded. He testified that it was his understanding that her injuries did not involve the pelvic area. In contrast, two of defendant's family members testified that trial counsel was told during the early stages of representation that the accident caused the victim to suffer "severe vaginal bleeding." A medical expert testified that the

victim's post-accident treatment may have caused any physical "abnormalities" diagnosed by the prosecution's expert.

We agree that trial counsel's performance would have been deficient if he knew that the victim suffered pelvic injuries in the car accident and failed to somehow incorporate those facts into a defense. Thus, resolving this question necessarily turns on whether trial counsel knew, before the trial, that the victim suffered pelvic injuries during the accident. After the *Ginther* hearing, the trial court specifically found that trial counsel did not learn about the pelvic injuries until after the trial. Because the witnesses' testimony was in conflict, resolution of this issue turned on the witnesses' credibility. Witness credibility issues are for the trier of fact to decide, and "we will not resolve credibility issues anew on appeal." See *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Because there was ample evidence supporting the trial court's finding, we are not persuaded that the finding was clearly erroneous. *LeBlanc*, *supra* at 579. Accordingly, we reject defendant's contention that trial counsel was deficient.⁴

Defendant also challenges trial counsel's efforts in failing to refute the prosecution's medical expert. However, we agree with the trial court's finding that counsel made reasonable efforts to explore the possibilities of refuting the prosecution's expert testimony. Indeed, trial counsel wrote two doctors and telephoned a third; however, the first two doctors did not respond and the third doctor's comments indicated that this line of defense would not be successful. Thus, trial counsel reasonably concluded that he would not be able to refute the prosecution's medical expert. As such, we are not persuaded that trial counsel's performance was deficient. *Snider*, *supra* at 423-424.

Moreover, we note that developing the possibility that the accident could have resulted in physical conditions resembling those commonly associated with sexual abuse would only have presented an alternative explanation for the complainant's physical condition. It would not have eliminated the possibility of sexual penetration, nor would it have called into question the victim's compelling testimony against defendant. Accordingly, we cannot conclude that, but for trial counsel's failure to refute the prosecution's expert testimony, defendant would not have been convicted. *Snider*, *supra* at 423-424. Consequently, we reject defendant's contention that counsel was ineffective as to this issue. *Id.*

⁴ Although defendant's question presented contends that trial counsel improperly conceded that sexual abuse occurred, we note that defendant presented no argument or authority in support of this contention. It is well established that a party abandons an issue by merely stating a position and leaving it to this Court to discover and rationalize the basis for the claim. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999). Moreover, in light of the trial court's finding that trial counsel was not aware of the victim's pelvic injuries, it is all the more reasonable that trial counsel would shift to a strategy blaming another party for the sexual abuse. Therefore, this argument is without merit.

Along the same lines, the trial court's finding that trial counsel was not aware of the victim's pelvic injuries prevents a finding that trial counsel was deficient for failing to obtain the victim's medical records.

Defendant contends that defense counsel was ineffective for failing to make the most of certain impeachment opportunities. We disagree. Defendant's arguments focus on the inconsistencies between the victim's testimony and the mother's testimony. A proper impeachment opportunity would only arise if a witness made inconsistent statements, not if multiple witnesses testify differently. In other words, a witness cannot be impeached by another witness's testimony. Moreover, although defendant contends that the victim made inconsistent statements, defendant fails to reference any specific examples. Accordingly, we are not persuaded that trial counsel's performance was deficient. *Snider, supra* at 423-424.

Defendant also contends that defense counsel was ineffective for asking the victim whether her testimony was consistent because her response opened the door for the prosecutor to "rehabilitate" the witnesses with prior consistent statements. Here, the victim testified that she could not remember whether her testimony was consistent with her previous statements and testimony. We fail to see how eliciting this response harmed defendant's case, especially where the prosecution's rehabilitation efforts were brief and not particularly forceful. Moreover, we note that aggressively impeaching the victim could have had a negative result—increasing the jury's sympathy for her, rather than drawing attention to the discrepancies. Trial counsel in a case like this must proceed delicately. Accordingly, we reject defendant's contention that trial counsel's performance was deficient. *Snider, supra* at 423-424. Consequently, we conclude that defendant was not deprived of his constitutional right to effective assistance of counsel.

Finally, defendant contends that, even if no single claim of error warranted reversal, the cumulative effect of all such errors does require reversal. However, having concluded that defendant has failed to show any prejudicial error, we reject this argument. See *LeBlanc, supra* at 592.

Affirmed.

/s/ William C. Whitbeck, C.J.

/s/ Donald S. Owens